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CHARLES ELMORE CROPLI
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950
No. 289

BURNS STEAMSHIP COMPANY,
Petitioner,

against

NATIONAL BULK CARRIERS, INC., as owner of STEAMSHIP NASHBULK,
Respondent.

CONSOLIDATED CAUSE.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN C. PRIZER,
Counsel for Respondent.

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I.

The present case is one in which justice has clearly been done and which rests basically on issues of fact.

The case involves a collision on the high seas between the "Nashbulk" and "Rutgers Victory", which came together on crossing courses. The "Rutgers Victory", the burdened vessel, not only made no effort whatever to obey the navigation rules and keep out of the way of the "Nashbulk", but was not even aware of the presence of the "Nashbulk", since for a long time preceding the collision she had been maintaining no lookout of any kind. The "Nashbulk", on the other hand, maintained an alert lookout and when the vessels reached a position where, in the judgment of

her master, the burdened vessel could not avoid collision by her action alone, the "Nashbulk" took prompt and vigorous action to check her own headway and very nearly succeeded in preventing the collision. Indeed had not the "Rutgers Victory" imprudently checked her headway, first by a hard left rudder and then by a hard right rudder in the last half minute before collision, it is even possible that no collision would have occurred.

The district judge who, as a Naval officer, had had practical experience as a navigator, drafted his own findings of fact and conclusions of law. Those findings and conclusions (R. pp. 212-15), give an accurate outline of the evidence and the factual conclusions supported by the evidence.

The trial judge found, and the evidence amply supported his findings, that the "Rutgers Victory" was guilty of the grossest negligence, and that the "Nashbulk" was prudently navigated, that she was guilty of no violation of the rules, and that even if she had been guilty of a violation such violation would have been excused as committed *in extremis*.

The opinions of the Court of Appeals judges, without discussing the evidence, take the view that the manoeuvre of slow ahead-hard right rudder, made about a minute and a half before collision in order to check the headway of the "Nashbulk", called for the blowing of a one whistle signal, since it caused a change of heading. The prevailing opinion held, however, that the failure to blow the one whistle signal could not have contributed to the collision since the navigators of the "Rutgers Victory" did not know of her presence and were not navigating with reference to her course. The dissenting judge, believing that the swinging of the "Nashbulk's" head to starboard called for a one whistle signal, dissented from the conclusion that the failure could not have contributed to the collision. He states in his opinion, however:

"An equal division of damages in this case would be plainly unjust; they ought to be divided in some such proportion as five to one" (R. p. 238).

II.

Alleged question presented—issue of whistle signal.

Petitioner's brief makes an entirely erroneous presentation of the issue of the failure to blow a one whistle signal. The issue was not whether a 5° change of course or a 90° change of course calls for the blowing of a whistle signal. The issue was whether the manoeuvre of slow ahead-hard right rudder taken solely to check the headway of the vessel preliminary to and in fact followed within less than a full minute (R. p. 110; fol. 330; p. 124, fol. 372) by full speed astern, presented a situation calling for a whistle signal to indicate "I am directing my course to starboard". No doubt the vessel's head fell off to starboard and the falling off was accentuated by the backing. The forging ahead of the vessel in a partly sideways position was intended to be and was actually the most effective means of checking her speed (R. pp. 63-4; fols. 187-90).

III.

The alleged conflict of decisions.

According to the view of the majority of the Court of Appeals, since neither the change of course (Respondent does not admit there was a change of course) nor the failure to announce that change of course could have been a contributing cause to the collision, the fact that the blowing of a whistle might have served a useful purpose as an alerting signal, when an alerting signal was not authorized

or required, did not render it a contributing fault. That view, Petitioner urges, is in conflict with other decisions.

Certainly the majority decision is in accord with the Ninth Circuit Court of Appeals decision in *Crowley Launch & T. Co.* v. *Wilmington Transp. Co.*, 117 F. (2d) 651, cited and quoted in the opinion (R. 236).

The decision of this court in *The Manitoba*, 122 U. S. 97, referred to on pages 5 and 7 of the petition and brief, has no bearing upon the question under consideration. In that case vessels were meeting very nearly head to head on courses almost parallel. It was necessary for each vessel to announce by whistle the side on which she proposed to pass the other, and the failure to blow the necessary passing signals to indicate the courses which the vessels were taking was the direct cause of the collision.

None of the Second Circuit Court cases presents a conflict. In *The Comus*, 19 F. (2d) 774 (Brief, p. 10), the holding-on vessel in a crossing course situation failed in her duty to hold her course and speed, making a premature unannounced course change.

The case of *The Cushing*, 266 Fed. 570 (Petitioner's Brief, pp. 10-11) was a substantially head and head situation under blacked-out war conditions, in which an unnecessary and unannounced change of course by one of the vessels was the direct cause of the collision.

The *Corozel*, 62 F. Supp. 123 (Petitioner's Brief, p. 11) and *The Hawaiian-Larchgrove*, 1931 A. M. C. 1987 (Petitioner's Brief, p. 12) both likewise involved cases of vessels meeting substantially head and head, where the unannounced alteration of course contributed directly to the collision.

The English cases cited in Petitioner's brief (p. 12) involved facts bearing no relation to the present case. The case of *The Testbank*, 70 Lloyd's List L. R. 270, like the

case of *The Cushing, supra,* involved vessels approaching head and head under blacked-out war conditions in which an unnecessary and unannounced change of course by one of the vessels was a direct cause of the collision. The cases of *The Atland,* 76 Lloyd's List L. R. 38 and *The Jean Jadot,* 75 Lloyd's List L. R. 153, cited in the Court of Appeals decision in the present case, were both lower court decisions and were decided by the same judge. They involved vessels proceeding in substantially the same direction in blacked-out convoys where even small changes of course made in close quarters for the purpose of reducing the danger of collision, were of extreme importance. The language of Mr. Justice Bucknill in those two cases must be considered in the light of the facts which the court had under consideration.

In both *The Atland* and *The Jean Jadot* cases *supra,* Mr. Justice Bucknill regarded the vessels which were criticized for omitting to blow a whistle signal, as being guilty of a minor fault only, and under the English rule of apportionment held those vessels responsible in each case for only one-fifth of the damages resulting from the collision. Had the English rule of unequal apportionment not been available to him and had he been applying the American rule of major and minor faults it is highly improbable that any liability would have been predicated upon the minor fault.

IV.

The District Court was correct in finding that the fault, if any, committed by the "Nashbulk", was a fault *in extremis*.

The District Court found both as a Finding of Fact and a Conclusion of Law that the "Nashbulk" was placed in a position *in extremis* when she was called upon to take emergency action to avoid the collision (Finding 15, R. 214; Conclusion 3, R. 215). That Finding and Conclusion were amply supported by the evidence and were entirely consistent with previous judicial decisions.

Wilson v. *Pacific S. S. Co.*, 276 U. S. 454;
The Gulfstar, 136 F. (2d) 461 (3 C. A.);
The Pacific-Atlantic Steamship Co. v. *United States*, 63 F. (2d) 414 (9 C. A.);
The Binghamton, 271 Fed. 69 (2 C. A.) cert. denied 255 U. S. 575.

The Court of Appeals majority opinion contains a dictum that the "Nashbulk" could not be regarded as *in extremis* since for a long time her navigators had known that if the burdened vessel failed to take proper avoiding action they might be required to act, apparently overlooking the fact that what action they might be required to take could not be determined until at the very last moment they learned what action the burdened vessel was then taking or failing to take. The cases cited in the Court of Appeals opinion do not support that court's view.

Two of the cases cited by the court, namely, *The Favorita*, 85 U. S. 598 and *Publicover* v. *Alcoa S. S. Co.*, 168 F. (2d) 672, are examples of the principle that a vessel which, by its own negligent navigation has created a situation of peril, cannot rely upon the defense of *in extremis* although the other vessel can. In the third case cited,

namely, *The Queen Elizabeth,* 122 Fed. 406 (cert. denied 190 U. S. 560), the holding-on vessel, the "Queen Elizabeth", was held to have been placed in a position *in extremis* by the burdened vessel, the "Birdsall", notwithstanding the fact that the navigators of the "Queen Elizabeth" had been carefully observing the "Birdsall's" light from a distance of several miles (see p. 409, middle).

This court in its opinion in the crossing course case of *Wilson* v. *Pacific S. S. Co.,* 276 U. S. 454, upheld the contention of counsel for the "Svea" that the "Svea" found herself in a position *in extremis* when collision was imminent, notwithstanding the fact that she had had the burdened vessel under observation for a long time. This court said:

> "If in the difficult circumstances forced upon him her navigator, whose qualifications are not questioned, exercised his best judgment in not departing therefrom, the burdened vessel must accept the consequences. Having driven him into a perplexing situation, the Newport cannot complain because he failed to make the most judicious choice between the hazards presented" (276 U. S. pp. 461-2).

V.

No alerting signal was appropriate.

Petitioner's brief apparently suggests (pp. 17-18) that the "Nashbulk" was under some indefinite duty to alert the "Rutgers Victory" even during the time when the latter vessel continued to have an opportunity to obey the rules and avoid the collision by her own action alone. No support for that contention was given by either of the lower courts and it is without foundation. The International Rules place a rigid duty upon the holding-on vessel to maintain her course and speed and upon the giving-way vessel to keep out of the way. The only whistle signals authorized

by the International Rules (as distinguished from the Inland Rules) are those provided in Article 28 to indicate course changes or the backing of the engines.

The point of view of the practical navigator is well expressed in an article appearing in the June 1947 issue of the publication entitled "Proceedings of the Merchant Marine Council, United States Coast Guard" (published monthly at Coast Guard Headquarters, Washington 25, D. C.) in which the following statement is made with respect to the instant situation at page 104:

> "In cases of this sort and there have been a number of them, very little sympathy can be given to the officer in charge of the burdened vessel. The officer who is in real need of sympathy is the master of the privileged vessel as he must hold his course and speed and trust to the grace of God and good luck that the other fellow is maintaining a proper lookout as required by the law."

VI.

Justice has very clearly been done by the lower courts and the fault, if any, of the "Nashbulk" is of such a minor nature that it should be disregarded under the minor fault rule.

> *The City of New York,* 147 U. S. 72;
> *The Victory and The Plymothian,* 168 U. S. 410;
> *The Oregon,* 158 U. S. 186;
> *The Great Republic,* 23 Wall. 20.

In the oft-quoted language of this court in "The City of New York", *supra*:

> "Where fault on the part of one vessel is established by uncontradicted testimony and such fault is, of itself, sufficient to account for the disaster, it is

> not enough for such vessel to raise a doubt with regard to the management of the other vessel" (147 U. S. at p. 85).

More emphatic still is the following statement of this court appearing in *The Victory and The Plymothian, supra*:

> "The recognized doctrine is thus stated by Mr. Justice Brown in *The Umbria*, 166 U. S. 404, 409: 'Indeed so gross was the fault of the Umbria in this connection that we should unhesitatingly apply the rule laid down in *The City of New York*, 147 U. S. 72, 85, and *The Ludvig Holberg*, 157 U. S. 60, 71, that any doubts regarding the management of the other vessel, *or the contribution of her faults,** if any, to the collision, should be resolved in her favor' " (168 U. S. at p. 423).

In *The Oregon, supra,* a technical violation of the rule applicable to the height of the "Oregon's" anchor light above her hull was held not to have been a contributing cause to the collision even though her light was mistaken for the Coffin Rock Light (158 U. S. at p. 198).

In *The Great Republic, supra,* this court said:

> "It is pretty clear that the Cleona did not blow her whistle for each boat to keep to the right, as soon as he started for the opposite shore. This omission was a fault, but this fault bears so little proportion to the many faults of the Republic, that we do not think, under the circumstances, the Cleona should share the consequences of this collision with the Republic" (p. 35).

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* Italics ours.

CONCLUSION

The petition for a writ of certiorari should be denied.

JOHN C. PRIZER,
Counsel for Respondent.

Dated New York, October 9, 1950.